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Evolving the Right to Health: Rethinking the Normative Response to Problems of Judicialization

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Abstract

Judicial readings of the right to health—and related rights—frequently possess something of an “all or nothing” quality, exhibiting either straightforward deference to allocative choices or conceptualizing the right as absolute, with consequent disruption to health systems, as witnessed in Latin America. This article seeks to identify pathways through which a normatively intermediate approach might be developed that would accord weight to rights claims without overlooking the scarcity of health resources. It is argued that such development is most likely both to accompany and support a role for courts as institutions functioning within a society that is characterized by a deliberative conception of democracy.

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Introduction: Why worry about judicialization?

As the debate on the recognition and enforcement of socio-economic rights, both within international law and as components of domestic constitutional frameworks, has shifted ground from the question of their justiciability to that of their scope and content, the likelihood of such rights becoming the subject of judicial determination has increased. In the case of the right to health (or cognate formulations, such as the right to have access to health care services), “judicialization” is a widely recognized occurrence with particular resonance for certain regions, such as Latin America, as is clearly attested by the contributions to this journal special section.

While frequently problematized, judicialization is a more nuanced phenomenon than accounts often suggest. In addition to serving a practical purpose as a mechanism for securing access to medicines and services which may have been denied or restricted by health care providers in violation of principles of equity or considerations of clinical or cost-effectiveness, adjudication in the courtroom may also fulfill a deeper democratic function. First, it can act as a forum for accountability, offering an opportunity for government to explain, and the public to understand, the steps taken (or not taken) in respect of realization of the right to health, thereby contributing to its progressive realization. In short, “it is a process that helps to identify what works, so it can be repeated, and what does not, so it can be revised.”¹ Even more broadly (and as noted hereafter), it can operate as a catalyst for public debate upon the need for limit-setting choices; upon the criteria upon which such choices might be based; and upon the particular choice itself. In this manner, courts can assist in “unblocking” political or managerial processes which might otherwise be unresponsive to legitimate demands for access to health care resources.² Hence, while the precise nature and impact of judicial intervention will, of course, vary according to the politico-legal context, it is certainly plausible, as noted by Brinks and Gauri, that “courts’ decisions do not so much stop or hijack the policy debate as inject the language of

rights into it and add another forum for debate.”³

Nonetheless, it remains the case that judicial decisions can also have a significant disruptive impact upon the pattern of services and treatments that are made available within health systems. Two examples from Latin America are illustrative of this possibility. Research into legal actions to obtain access to medicines in São Paulo, Brazil, found that a tendency to comply mechanically with judicial rulings meant that

*there is no assessment of whether it is the best treatment in terms of the cost/benefit ratio, whether the patient truly needs the medication requested, whether it can be replaced by another treatment provided by the [public national] pharmaceutical programs, or even whether provision of this medication breaks a fundamental law or principle of the health care system.*⁴

Similarly, an analysis of cases brought in the Constitutional Chamber of the Supreme Court in Costa Rica showed that around 70% resulted in access being granted to low-priority or experimental medicines that “can be described as providing “marginal” health benefits for very severe conditions at a high cost for the health care system.”⁵

On the basis of such studies, one might plausibly evaluate right to health litigation as an activity that falls well short of a rationalist ideal of policy-making, which centers upon the pursuit of optimal solutions—understood to be those which can objectively be demonstrated to maximize benefits and minimize costs—developed on the basis of comprehensive information about alternative courses of action.⁶ Unfavorable comparisons are drawn with health technology assessment (HTA) as an evidence-based approach to problems of the allocation of scarce resources for health, founded upon instrumentally rationalist values of certainty, objectivity, method, and calculability.⁷ Thus, the Pan-American Sanitary Conference has criticized regular use of the courts in Latin America for its propensity “to ensure access to health technologies, often without having verified their effectiveness, [but which] can distort the process of incorporating new technologies,” in contradistinction to HTA as

a transparent and rational means of safeguarding a right to health anchored in principles of equity, equality, and solidarity.⁸

The gradual evolution of HTA institutions across Latin America may, in due course, result in a reconfiguration of the socio-political environment in which decisions on allocation of scarce health care resources are made, as well as the criteria which underpin them. Even so, the constitutionalization of health rights across the region, coupled with the singular importance of such choices to individuals and their families, will render a continued role for courts inevitable; “the language of rights, the mechanism of courts, the intervention of lawyers, and the cumbersome tools of the law have become a permanent and prominent part of the policy-making landscape.”⁹ It is therefore important to maintain a reflective attitude towards health rights adjudication as an activity of ongoing political, social, and economic significance.

Reflecting upon further avenues for future research and development in light of an analysis of health rights litigation (with a primary, but not exclusive, focus on Latin America), Yamin has argued that

*clarifying the normative foundations and conceptions of health will be critical in order for courts to provide a framework for facilitating appropriate decision-making processes relating to constantly evolving claims of what we owe each other in regard to health and health care.*¹⁰

This article seeks to undertake some initial steps in this direction, through critical consideration of possible normative bases through which the right to health might be further developed. The intention is not to offer a complete investigation of the matter, but rather to initiate a discussion of some mechanisms by way of which the right to health might stand alongside, and perhaps even facilitate, the types of “informed, well-thought choices involving trade-offs of societal values” that are increasingly imperative given the significant and growing problems of health system sustainability that prevail not only in Latin America, but worldwide.¹¹ As will be seen, several difficult issues remain unsettled,

providing fruitful scope for further analysis of, and debate upon, this highly complex topic.

Reading the right to health against scarcity

Much important recent work in this context has focused upon the *impact* of health rights litigation, but the normative foundation of the right to health, described in 2011 as having generated “remarkably little literature,” has also received increasing attention.¹² Nonetheless, the tension between the existence of a presumptively conclusory right of access and the finite nature of resources for health care remains acute: indeed, one highly eminent scholar in the field has described the need to set priorities for allocation as a “blind spot” of the health and human rights movement.¹³ Some authors have responded to this tension by expressing scepticism as to whether a right to health is feasible at all.¹⁴ Others have noted that the fact of scarcity renders rights-based approaches of limited utility in addressing problems of health inequity *in practice*.¹⁵ However, given the inevitability that rights to health will continue to be the subject of adjudication, this stance does not seem especially helpful: even if there are sound philosophical arguments for not according health (or access to health care) status as rights, the fact remains that they are presently so recognized, and are likely to remain so.

At the other end of the scale is a reading of the right to health that treats it as absolute, one which

*expresses demanding moral claims in a sort of ‘line item’ way, presenting each individual’s case peremptorily, as though it brooked no denial, no balancing, no compromise.*¹⁶

From this perspective, the fact of scarcity is irrelevant; the right must be upheld irrespective of the impact upon resources and the broader common good. As Rumbold observes, few would adhere to this absolutist reading of the nature of rights (whether generally, or in the health context in particular).¹⁷ Nevertheless, rights carry very significant weight, both as legal claims and as modes of political discourse, as captured in Dworkin’s

influential metaphor of rights as “trumps over some background justification that states a goal for the community as a whole.”¹⁸ Institutional factors further reinforce this approach: adjudication in the courtroom tends to focus judicial—and public—attention upon the individual claimant, especially in systems (such as that of Brazil) where health rights claims are almost always made on an individual basis rather than as collective or class actions, and the court’s ruling applies only to the parties directly involved in the litigation.¹⁹

Although rights to health contained within domestic constitutional or international human rights instruments at base embody legal and discursive claims of a substantive character, it is possible for courts to afford some degree of protection to claimants through *procedural* means, such as obliging decision-makers to publish their decisions and the criteria upon which they are based, or facilitating participation in processes of decision-making. In these instances, it may be argued that the effect of adjudication is to enforce the conditions of the “accountability for reasonableness” model of procedural justice.²⁰ In this manner, adjudication can contribute to facilitating “social learning” as to the need for limit-setting in health care and the criteria which might underpin decisions in this context. This is valuable as a means of securing legitimacy for difficult choices, even in the absence of an agreed ethical basis for achieving justice in the distribution of scarce resources. This dimension of judicialization has been explored at length in the literature and will not be developed further here.²¹

When judges engage with the right to health from a substantive perspective, they might be said (with a degree of simplification) to take any of three positions on the scale outlined above. First, the mere fact of scarcity may straightforwardly defeat the rights claim outright, calling into question the feasibility of giving effect to the right in any circumstances. At the other end of the scale, the rights claim acts as a “trump”, with the consequence that such resources are allocated as are necessary to give effect to the claimant’s right, irrespective of the possible impact upon others who are not appearing before the court. Both of these judicial

stances might be regarded as problematic. The first seems to attach insufficient weight to the right as a claim *in law* and appears incompatible with the trend towards the justiciability of socio-economic rights. The second accords insufficient weight to the opportunity costs of giving effect to the right, and thus carries particular potential for disruption to the rational distribution of scarce resources within a health system.

A middle ground? Proportionality and the right to health

However, between these two extremes exists a potential position in which judges may scrutinize the decision-maker’s rationale for failing to give effect to the right, with a view to ensuring that the justifications offered accord with broadly shared community values as to what is appropriate within the particular society in question. In such circumstances, the court seeks to establish that the decision-maker’s explanations correspond with “public reason”, which may be understood as reasonable judgments about what justice and good policy requires under the circumstances: that is, reasons which are publicly appropriate in a liberal democracy.²² If so, the court determines that the putative infringement of the right is justified, and thus not unlawful.

Adoption of an approach along these lines requires that judges continue to afford protection to the individual’s right, which retains significant weight. This is so in two ways: first, once the claimant has demonstrated that a right is engaged, the burden of explanation falls upon the decision-maker to show that there are justifiable reasons for restricting the right. If such explanations are not forthcoming or do not convince the court, the decision will be deemed unlawful, at least until adequate justification *is* provided. Secondly, the right is to be realized to the greatest extent possible given countervailing considerations; put differently, the interference with the right should be no greater than is necessary to achieve the legitimate countervailing objective(s). But, while weighty, the right is not absolute and, in appropriate circumstances,

will yield to legitimate policy goals. This therefore creates space for judges to recognize and give effect to considerations of scarcity, given that equitable distribution of scarce resources is, at least ostensibly, a policy goal that free and equal citizens of a liberal democratic society can reasonably accept.

Kumm notes that this necessitates a “re-characterization” of the nature of rights, and of adjudication upon them.²³ The focus is not solely on the interpretation and application of legal principles, but also (and primarily) on the assessment of justifications, with the right operating not as a demarcation of the boundaries of governmental actions and decisions (in effect operating as a “fire-wall” to insulate legal claims from political activity which might negate or defeat them), but instead as a trigger for an inquiry into the justifiability of these boundaries. This approach thus connects to “the emergence of a transnational culture of justification” in which the authority of government to act rests not on the exercise of power, but rather upon the provision of cogent and persuasive rationales for its decisions and actions.²⁴ More broadly still, it links to accounts of legitimacy in conceptions of deliberative democracy which emphasize the giving, weighing, acceptance, and rejection of reasons to encourage reflection upon, and possible transformation of, preferences in a non-coercive manner. This is notable, given that deliberative approaches have been viewed as especially germane to addressing problems of legitimacy arising from the need to make difficult choices on the allocation of scarce health care resources.²⁵

Various tools exist through which judges can give effect to an approach of this type. These include balancing, which is especially prominent in US constitutional jurisprudence, and reasonableness, which carries a variety of meanings permitting courts to adopt stances towards governmental decisions and actions ranging from extreme deference to intense scrutiny.²⁶ However, the most widely used mechanism is proportionality, which entails a multi-stage analytical process. Once a putative infringement of a right has been established, the government (or other duty-bearer) must show (1) that the actions, decisions, or policy which impact-

ed upon the right were in pursuit of a legitimate aim; (2) that the actions, decisions, or policy were a suitable means of achieving the aim; (3) that there is no less intrusive but equally effective means of achieving the aim; and (4) that the actions, decisions, or policy represent a net gain when the infringement of the right is measured against the level of realization of the aim (the balancing stage, or proportionality in the strict sense).²⁷ In this manner, proportionality review can function to construct the content of socio-economic rights (including those to health) in such a way that these express “a proper balance between conflicting considerations and reflect appropriate means-end rationality.”²⁸ It appears, therefore, to represent an obvious tool by means of which the excesses of judicialization in the health context can be restrained: indeed, it has been said to have “a disciplining and rationalizing effect on judicial decision-making.”²⁹ Its use would therefore better enable this activity to approximate rationalist modes of allocative decision-making, such as HTA.

As Gardbaum observes, the connection between proportionality, reasonableness, and balancing is close: proportionality amounts to a particular form of reasonableness (reasonableness as proportionality), and incorporates a particular form of balancing, that is “whether the value, benefits, or gains of attaining the purpose are weightier than the value, costs, or injuries incurred in achieving it.”³⁰ Each of the three tests can be fitted within a “particular conception of liberal democracy in which all government actions interfering with individual rights and/or autonomy must be justified in terms of public reason,” in which

*the task of courts is to ensure not that the government has reached the one correct resolution of a contested rights issue but that the required justification for its actions falls within the parameters of the reasonable.*³¹

Hence, if, as suggested below, commitment to a particular conception of democracy is a prerequisite to adoption of a middle way between scarcity and the right to health, any one of these tests might be a suitable candidate for courts to adopt.

However, the value of adopting proportionality as a standard for review, apart from its familiarity to judges and decision-makers, would seem to lie in the fact that it functions by “setting a series of ground rules for the lawmaker,” which the lawmaker may satisfy

by demonstrably showing that he carefully set the aim of measures that infringe on social rights; that he then considered the availability of other measures less impairing to the right; and that he went through this process elaborately and openly, so that his choice is reviewable by the courts,

although political choices continue to reside with legislature and government.³² It therefore imposes a greater degree of structure and transparency upon decision-making than do the looser tests of balancing or reasonableness, and thus, while functioning as a substantive form of review (insofar as its application is triggered by alleged violation of a substantive right), it has significant procedural benefits, serving as a means of ensuring that the conditions of the “accountability for reasonableness” model are realized.³³

Proportionality has secured status as “a dominant technique of rights adjudication in the world.”³⁴ It is regarded as a central component of a “global model of constitutional rights.”³⁵ Yet its meaning and applicability remain the subject of significant scholarly disputation.³⁶ Within the context examined here, the primary matter of contention is its appropriateness as a standard for adjudication upon socio-economic rights. For example, Contiades and Fotiadou, Gardbaum, and Young all note judicial resistance to its use in cases of this type.³⁷ A central difficulty resides in its utility in situations of scarcity. This is well captured by Möller, who argues that the test is redundant in socio-economic cases

*because in almost all circumstances the realization of those rights requires scarce resources; therefore any limitation will always further the legitimate goal of saving resources and will always be suitable and necessary to the achievement of that goal.*³⁸

However, this view has been challenged. Gardbaum argues that husbandry of scarce resources has not

been specified in constitutional documents or international rights instruments as a public policy objective which *can* legitimately be set against a right, and moreover that it is not always the case that limitation of a right *will* necessarily save resources. For example, permitting access to certain public health interventions (such as the provision of nevirapine for prevention of mother-to-child transmission of HIV/AIDS) may serve to reduce health expenditure in the longer term.³⁹ Furthermore, Contiades and Fotiadou emphasize that the “defensive aspect” of proportionality—protecting rights against limitations imposed by government, as outlined in Möller’s account—is not the basis of its applicability in cases involving socio-economic rights. Instead, it functions in more “creative” fashion, acknowledging the existence of competing legitimate interests and competition for resources, but ensuring that consideration of these by a decision-maker is undertaken “in a highly disciplined manner.”⁴⁰

Disagreements of this sort are far from uncommon in the literature on proportionality. They demonstrate that the concept remains deeply contested.⁴¹ This author would argue, therefore, that any agenda for future research on the right to health and the role of courts should incorporate close analysis of the applicability and utility of proportionality. This will allow for a more far-reaching assessment of whether it can plausibly function as a standard which facilitates a middle way between rights and scarcity in the manner suggested here.⁴²

Towards a relational reading of health rights

Deployment of the proportionality test as the standard of review in instances where health-related rights are undergoing adjudication is not the only plausible step towards reorienting these in a manner which would avoid both supine judicial deference to political and managerial choices in health care on the one hand, and a conclusory—perhaps peremptory—implementation of the right on the other. Rethinking the nature and meaning of the right to health itself represents a further avenue which might be pursued. Interestingly, there is

judicial support for an endeavor of this type in the following, written extra-judicially by South African Constitutional Court judge Albie Sachs:

*The progressive realization of socio-economic rights within available resources... indicates that a system of apportionment is fundamental to their very being. I am not sure as to the full implications of this distinction, both in terms of conceptualizing the nature of the right and in respect of determining appropriate remedies for a breach. Yet I am convinced that the exercise of a right that by its nature is shared, often competitively, with other holders of the right, must have different legal characteristics from the exercise of a classical individual civil right that is autonomous and complete in itself.*⁴³

Sachs had himself given a pointer to the possible form that such a reconceptualization might take in the case of *Soobramoney v. Minister of Health (KwaZulu Natal)*, where he made the following observations:

In all the open and democratic societies based upon dignity, freedom and equality with which I am familiar, the rationing of access to life-prolonging resources is regarded as integral to, rather than incompatible with, a human rights approach to health care... Health care rights by their very nature have to be considered not only in a traditional legal context structured around the ideas of human autonomy but in a new analytical framework based on the notion of human interdependence. A healthy life depends upon social interdependence: the quality of air, water, and sanitation which the state maintains for the public good; the quality of one's caring relationships, which are highly correlated to health; as well as the quality of health care and support furnished officially by medical institutions and provided informally by family, friends, and the community... Traditional rights analyses accordingly have to be adapted so as to take account of the special problems created by the need to provide a broad framework of constitutional principles governing the right of access to scarce resources and to adjudicate between competing rights bearers. When rights by their very nature are shared and interdependent, striking appropriate balances between the equally valid entitlements or expectations of a multitude of claimants should not be seen as imposing limits on those rights, but as

*defining the circumstances in which the rights may most fairly and effectively be enjoyed.*⁴⁴

Here, Sachs rejects the traditional “defensive” account of proportionality centered upon the judicial mitigation of limitations imposed by government. More broadly, and perhaps unknowingly, the judge appears to be articulating an approach to rights that is grounded in notions of relational autonomy, which have proved especially influential in the health care field in the context of care ethics and, more broadly, feminist bioethics.⁴⁵ This is:

*The label that has been given to an alternative conception of what it means to be a free, self-governing agent who is also socially constituted and who possibly defines her basic value commitments in terms of interpersonal relations and mutual dependencies. Relational views of the autonomous person, then, valuably underscore the social embeddedness of selves while not forsaking the basic value commitments of (for the most part, liberal) justice.*⁴⁶

At least superficially, this conception, grounded in a view of the human condition and political life as fundamentally interdependent, seems to meet Sachs’ call for a “new analytical framework” that can incorporate allocative decision-making alongside, rather than in opposition to, health-related rights. As Tauber argues,

*rationing... assumes its moral force from a dual allegiance to notions of communal responsibilities of individuals (relational autonomy) and a social philosophy advocating equitable sharing of communal health care resources (distributive justice).*⁴⁷

However, an important question is whether this approach is consonant with ideas of rights at all. For example, Tauber considers that a relational approach to autonomy “radically recasts widespread beliefs about individuality and rights. It shifts the burden of moral action on meeting obligations to others, as opposed to asserting self-defined liberties.”⁴⁸ Others working within the care ethics approach have been openly critical of rights for their (perceived) tendency to “insulate” existing structures of power

domination.⁴⁹ A further concern for relational theorists (and others) is the oppositional character of rights, which are seen in conflictual terms requiring determination of the weightier, “winning” claim and thus emphasising the separation, rather than interconnectedness, of individuals from each other and from the collective.⁵⁰

Can rights, then, be incorporated into a relational approach? One scholar who has taken on the challenge of addressing this question is Jennifer Nedelsky, who notes that “the practical issue is not *whether* but *how* the language of rights will be used” and who argues for a shift in understanding of the concept and how it is applied.⁵¹

Nedelsky argues that

what rights do and have always done is construct relationships – of power, of responsibility, of trust and obligation... in defining and enforcing rights, the law routinely structures and sometimes self-consciously takes account of relationship;

and she proposes that this structuring function should form the central focus of the idea of rights, their enforcement and interpretation.⁵² From this perspective, she challenges the individualistic orientation of rights inherent in liberal political thought, rooted in “the image of protective boundaries as essential to the integrity and autonomy of the self [which] is deep and pervasive in Western culture.”⁵³ Rather, her goal is that

*the focus of analysis will shift from an abstraction of individual entitlement to an inquiry into the ways the right will shape relations and those relations, in turn, will promote (or undermine) the [collective societal] values at stake.*⁵⁴

While Nedelsky accepts that this will not resolve all disagreements, given that the meaning both of rights and of the underlying community values they capture (such as equality, freedom, and adequate material resources) is contested and evolves over time, her argument is that those disagreements are better couched within a debate “in terms of why people think some patterns of human relationships are better than others... and what sorts of legal rights will foster those relationships.”⁵⁵ That debate

might end up according priority to individual over collective claims, but it would at least do so on the basis of justification of those claims, rather than “tacit assumption.”⁵⁶ This therefore returns us to the “culture of justification” and ideas of deliberative democracy which were sketched above and which will be explored further in the next section of this article.

Feasibility is perhaps the greatest obstacle to adoption of a relational approach along the lines Nedelsky suggests. Although she claims that there is scope to use existing legal systems, institutions, processes, and norms to give effect to the framework she advocates, Nedelsky acknowledges that it would amount to a “transformation,” a “gestalt-like change in how people see the world, in daily habits of thought as well as political theory and jurisprudence.”⁵⁷ In particular, it represents a counter-hegemonic challenge to the “dominance of the liberal consensus” on human rights, which is rooted in deeply held individualistic, perhaps atomistic, visions of autonomy.⁵⁸ Shifting the paradigm in such a way is clearly no straightforward matter. This is especially the case as the greater attention drawn by the relational reading to the contested nature of the societal values that underpin rights, and the different means by which these may best be given effect, tends to dilute the simplicity and absoluteness of a rights claim. Since it is these latter qualities that have made the right to health a valuable focus for campaigns for access, such as to treatment for HIV/AIDS, there would seem to be a lack of strong political incentive for claimants of health rights to endorse the relational approach.⁵⁹

Normative evolution and deliberative democracy

It might be concluded from the above discussion that, while normative evolution of the right to health in a manner that can accommodate the scarcity of resources is certainly possible, there remain awkward impediments to such development. At least for the present, the existence of these impediments means that work of a theoretical character on the normative basis of the right to health is un-

likely, *on its own*, to effect a transformation to the “all or nothing” quality of health rights litigation in practice. This is simply because, when confronted by such difficulties, it will be tempting for busy judges merely to reaffirm commitment to either of the activist or restrained positions identified above, rather than to seek to clear their own pathways through tricky normative territory in which, as practitioners rather than theoreticians, they are likely to be somewhat uncomfortable.

However, if the type of normative clarification and rethinking outlined here were to be accompanied by cultivation of a particular attitude to the role of courts within a democratic society, this would significantly enhance the prospects for development of a framework permitting proper judicial consideration of the interconnectedness of individual rights to health care and obligations to the community in circumstances of scarcity. The nature of that role has been alluded to above: a conceptualization of the courts as institutions contributing to and functioning within a deliberative democracy, rather than bodies whose determination of questions of rights is definitive and binding.

On this reading, the courtroom provides an arena in which argumentation, reasoning, and explanation for policies and decisions can be publicly advanced and scrutinized. The rationales put forward for judicial decisions seek to

appeal to the political values [judges] think belong to the most reasonable understanding of the public conception and its political values of justice and public reason... that all citizens as reasonable and rational might reasonably be expected to endorse,

and such decisions play an “educative” role, enabling wider “political discussion to take a principled form so as to address the constitutional question in line with the political values of justice and public reason.”⁶⁰

Crucially, also, courts are viewed “as being not in a contestatory relationship with government but in a constitutional conversation with them,” with rights functioning not as absolutes or trumps but as standards of justification.⁶¹ Hence, the determination of the meaning and applicability of rights is not

the sole province of the judiciary, since the legislative and executive branches also have an important part to play in deciding how to balance individual rights against competing rights and interests.⁶²

The normative developments explored in this article clearly accord with a deliberative reading of democracy. As discussed above, proportionality is a judicial tool centered upon the provision of justification “in terms of public reasons, reasons of the kind that every citizen might reasonably accept, even if actually they don’t.”⁶³ Similarly, the relational approach proposed by Nedelsky connects closely to a deliberative conception. She notes that relationality requires “ways of continually asking whether our institutions of democratic decision-making are generating outcomes consistent with [basic] values.”⁶⁴ This connotes a “dialogue of democratic accountability” which is not premised upon the notion that certain values (rights) are trumps, but wherein those rights and the limits upon them are “open ended and shifting, requiring judgment and debate.”⁶⁵ For Nedelsky, therefore, accountability has a “back-and-forth” quality in which not only the institutions of government participate, but which also engenders wider public debate upon the societal values at stake, the kinds of relationships that would foster those values, and whether differing versions of rights would structure relations differently.⁶⁶

Yet, while, as suggested above, there is *potential* for courts to act as mechanisms through which effect can be given to institutional—and by extension, public—deliberation of the type Nedelsky envisages, it might be objected that their engagement in such an undertaking is problematic, in that it is insufficiently democratic, since judges are usually unelected. Moreover, the act of adjudication (especially, perhaps, the act of interpreting the meaning of constitutional provisions) necessitates specialist legal training and expertise, which can render it relatively inaccessible to the wider public. These general concerns may be exacerbated by the particular socio-political environments in which courts function. For example, in an analysis of Latin America, Hammergren points to a tendency towards insulation from external debate, a lack of

transparency and accountability, and a failure to appreciate the broader societal impacts of judgments, none of which are properly consonant with a deliberative approach.⁶⁷

It is notable, however, that other scholars have expressed much greater confidence in the deliberative capacity of courts, both in Latin America and elsewhere.⁶⁸ Here again, therefore, there exists much scope for further theoretical analysis and empirical investigation.

Conclusion

Gargarella has observed that, while articulation of a justifiable role for courts in health rights cases that “defies the ambiguous and unattractive notions of judicial restraint and judicial activism” is certainly possible, it nonetheless represents a “challenge” to conventional views on judicial review, the separation of powers and democracy.⁶⁹ The analysis presented in this article serves strongly to reinforce this assessment. Development and clarification of the normative basis of the right to health in a manner which would enable courts to respond sensitively and appropriately to conditions of scarcity is manifestly a highly demanding task. However, grasping this nettle will continue to be necessary, given that further health rights litigation—both in Latin America and across the globe—is inevitable and that problems of allocation within health systems will continue to manifest themselves as a consequence. The modest intention of the present author has been to trace certain pathways through which this challenge might be addressed. It is hoped that this will provoke others to further engage with and evolve this important work.

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